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IN THE
COURT OF APPEALS OF INDIANA

NATIVIDAD BALDERAS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 53A04-0507-CR-421
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Elizabeth Mann, Judge
Cause No. 53C02-9803-CF-278

August 25, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Natividad Balderas appeals the nineteen-year sentence he received after pleading guilty to attempted robbery as a class B felony.[1] We affirm.

Issues

Balderas raises two issues, which we restate as:

I. Whether the court improperly considered aggravating factors that had not been admitted by Balderas or submitted to a jury; and

II. Whether Balderas' sentence was inappropriate under Indiana Appellate Rule 7(B).

The State responds to both arguments and raises the following issue on cross-appeal: whether the trial court abused its discretion by granting Balderas' motion for permission to file a belated direct appeal.

Facts and Procedural History[2]

On March 20, 1998, the State charged Balderas with attempted robbery with a deadly weapon as a class B felony, burglary of a dwelling as a class B felony, and two counts of confinement with a deadly weapon as a class B felony. Appellant's App. at 13-14. On July

[1] *See* Ind. Code §§ 35-42-5-1 and 35-50-2-5; *see also* Appellant's App. at 13 (information setting out count I: "intentionally or knowingly, attempt[ing] to take property from another . . . while armed with a deadly weapon, to–wit: a knife, by breaking into the residence and demand[ing] money while armed with a knife, which act constituted a substantial step toward the commission of the crime of robbery"). At the time of the crime, Indiana Code Section 35-50-2-5 provided that the presumptive term for a class B felony was "a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances." That section has since been amended to provide: "A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." 2005 Ind. Acts 71 § 8, eff. April 25, 2005.

[2] The State adopted Balderas' Statement of the Case. Appellee's Br. at 1.

20, 1998, the court held a guilty plea hearing, and the parties filed a plea agreement. Pursuant to the agreement, Balderas would plead guilty to attempted robbery as a class B felony, the State would dismiss the three other counts as well as charges[3] pending in a separate case, and sentencing would be left to the trial court. *Id*. at 41. The court took "under advisement acceptance or rejection of [Balderas'] plea and the agreement pending receipt of" a presentence report. Guilty Plea Tr. ("GPTr.") at 25. At an August 17, 1998 hearing, the court accepted Balderas' plea and ordered a nineteen-year executed sentence. On November 13, 2003, Balderas filed a petition for post-conviction relief. App. at 71-78.

On June 24, 2004, the United States Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), which held that facts supporting an enhanced sentence must be admitted by the defendant or found by a jury. On November 9, 2004, our supreme court issued *Collins v. State*, 817 N.E.2d 230, 233 (Ind. 2004), in which it held that the "proper procedure for an individual who has pled guilty in an open plea to challenge the sentence imposed is to file a direct appeal or, if the time for filing a direct appeal has run, to file an appeal under [Indiana Post-Conviction Rule 2, belated notice of appeal]." Our supreme court further instructed, "the post-conviction court should have dismissed the petition for post-conviction relief for lack of jurisdiction without prejudice to any right [the defendant] may have to file a belated notice of appeal in accordance with the requirements of P-C.R. 2." *Id.*

On March 9, 2005, our supreme court issued *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied*, in which it held that the "sort of facts envisioned by *Blakely* as

[3] The two counts under the other cause number were for receiving stolen property as a class D felony and illegal possession of a handgun as a class A misdemeanor. GPTr. at 8; Supp. App. at 6.

necessitating a jury finding must be found by a jury under Indiana's existing sentencing laws." *Smylie* quoted the United States Supreme Court as follows: "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id*. at 687 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

On April 28, 2005, Balderas moved to dismiss his petition for post-conviction relief without prejudice to pursue proceedings under Post-Conviction Rule 2 and requested further assistance of counsel. App. at 92-95. The court granted the motion, and outside counsel was appointed by the State Public Defender. *Id.* at 96-99. On July 25, 2005, Balderas' new counsel appeared and filed a verified motion for permission to file belated notice of appeal. *Id.* at 100-08. Three days later, the court granted this motion. *Id.* at 109. Balderas filed his belated notice of appeal and, later, a supplemental notice of appeal. *Id*. at 110-11.

Discussion and Decision

I. Cross-Appeal

In its cross-appeal, the State asserts that the trial court abused its discretion when it granted Balderas' motion for permission to file a belated notice of appeal. The State maintains that Balderas did not present "any evidence regarding his diligence other than his own self-serving statements, if any, nor has he presented any evidence that he was without fault." Appellee's Br. at 16-17. Moreover, the State alleges that the trial court "failed in its duty to consider and find the two grounds stated in [Post-Conviction Rule 2] that [Balderas] was required to prove." *Id*. at 17. If meritorious, the cross-appeal would require that we

dismiss this appeal. The potential jurisdictional implications prompt us to address the State's cross-appeal[4] first. *See Hull v. State*, 839 N.E.2d 1250, 1253 n.1 (Ind. Ct. App. 2005), *trans. not sought*.

Indiana Post-Conviction Rule 2, which permits a defendant to seek permission to file a belated notice of appeal, provides in part:

> Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:
>
> (a) the failure to file a timely notice of appeal was *not due to the fault of the defendant*; and
>
> (b) the defendant has been *diligent* in requesting permission to file a belated notice of appeal under this rule.
>
> The trial court shall consider the above factors in ruling on the petition. Any hearing on the granting of a petition for permission to file a belated notice of appeal shall be conducted according to Section 5, Rule P.C. 1.
>
> If the trial court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period.
>
> If the trial court finds no grounds for permitting the filing of a belated notice of appeal, the defendant may appeal such denial by filing a notice of appeal within thirty (30) days of said denial.

Ind. Post-Conviction Rule 2(1) (emphases added). The rule does not explicitly require written findings.

"Although there are no set standards defining delay and each case must be decided on its own facts, a defendant must be without fault in the delay of filing the notice of appeal." *Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). Factors affecting this

[4] In its reply brief, Balderas argues that because at the trial court level the State did not challenge either the motion to file belated appeal or the court's grant thereof, the State cannot raise it for the first time on appeal. Reply Br. at 4-6. That is, Balderas contends that the issue is waived for untimeliness. In light of our conclusion that the trial court did not abuse its discretion in granting the motion to file belated appeal, we need not address Balderas' waiver argument.

determination include the defendant's level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether he was informed of his appellate rights, and whether he committed an act or omission that contributed to the delay. *Id*. Whether a defendant is responsible for the delay is a matter within the trial court's discretion. *Id*. "Although we acknowledge that the trial court is generally in a better position to weigh evidence and judge witness credibility and we defer to that discretion, such is not always the case." *Id.* Where the trial court does not conduct a hearing before ruling on a petition to file a belated notice of appeal, the only bases for that decision are the allegations contained in the motion. *Id*. Here, because we are reviewing the same information that was available to the trial court, we review the grant of Balderas' motion de novo. *See id*.

Balderas' petition alleged the following. At his August 17, 1998 sentencing hearing, Balderas was informed of his post-conviction rights, but not of his right to pursue a direct appeal to challenge his sentence. App. at 102; Sent. Tr. at 45-46. With the help of a "jailhouse lawyer," he filed a petition for post-conviction relief on November 13, 2003. App. at 102. In February or March 2005, a deputy public defender informed Balderas of his right to challenge his sentence by withdrawing his post-conviction petition and then pursuing a belated direct appeal. *Id.* at 102-03. As per Balderas' request, the deputy public defender did just that on April 28, 2005. *Id*. at 103. The court granted the motion on June 1, 2005, and, on June 21, 2005, appointed the State Public Defender to represent Balderas. *Id.* The case file was mailed on July 13, 2005, to current counsel, who first met with Balderas on July 22, 2005, and who filed the permission to file belated notice of appeal on July 25, 2005. *Id.*

Upon beginning his sentence, Balderas read at a fourth-grade level. *Id.* While he has since progressed to a sixth-grade reading level, he has no high school diploma or G.E.D. -- let alone training or experience in handling legal matters. *Id*. Finally, Balderas alleged that the "failure to timely file the Notice of Appeal within the thirty (30) day deadline . . . was not due to any fault on the part of Mr. Balderas" and that he "has been diligent in requesting permission to file the belated notice of appeal." *Id*.

Having scoured the appendices and transcripts, we find no indication that Balderas was informed of or was otherwise aware of his direct appeal rights. Moreover, there is no evidence or allegations that Balderas committed an act or omission that contributed to the delay. To the contrary, less than six months after *Collins* was issued, Balderas moved to withdraw his post-conviction petition and file a belated appeal. Approximately one month after the court appointed the State Public Defender, and just three days after first meeting with Balderas, outside counsel filed the permission to file a belated notice of appeal. As for the delay between Balderas' sentencing and the belated appeal, we must keep in mind, "[p]rior to *Collins*, there was a split in authority over whether the proper procedure to challenge a sentence imposed upon an 'open plea' was by means of a direct appeal or by means of collateral review under P-C.R. 1." *Kling v. State*, 837 N.E.2d 502, 505 (Ind. 2005). As such, "some delay may be attributable to the prior uncertainty in the law rather than the defendant's lack of diligence." *Id*. at 509. In summary, our independent review of the facts and circumstances presented here leads to the conclusion that the trial court did not abuse its discretion by granting Balderas' permission to file a belated notice of appeal.

II. Balderas' Blakely *Issue*

The court explained its sentencing decision as follows:

> [Balderas] has a *prior felony conviction from Washington County and while on probation* for the Washington felony he committed the new offense. Prior felony was committed while he was on probation for a misdemeanor offense in the same county. Further, [*Balderas] admits to other criminal activity, perhaps uncharged.* [Balderas] has not taken advantage of probation opportunities and seems to have a very *cavalier attitude toward this drug and alcohol problem.* His use of alcohol began at the age of eleven. His use of drugs began the following year. The *facts and circumstances of this crime*, distinguish it from other attempted robberies in an aggravating man[ner]. According to the reports that I have read [Balderas] hit one of the victims with a baseball bat. The phone line to the victims' residence was cut. [Balderas] and his co-defendant kicked in the door of the victims' home while they were sleeping. The only mitigating factors are the *relatively young age* of [Balderas], and his *emotional disability* that was noted for the first time in the first grade. Given [Balderas'] *criminal history* and *prior attempts at rehabilitation* the Court gives little weight to these factors. The aggravating circumstances clearly outweigh the mitigating factors. Therefore, [Balderas] is sentenced to nineteen years in the Department of Correction. Court recommends to the Department of Correction that it provide psychiatric treatment, and drug and alcohol treatment, to [Balderas].

Sent. Tr. at 42-44 (emphases added); *see also* App. at 45-46 (August 17, 1998 order on change of plea and sentencing).

Balderas asserts that the questions of whether he had a cavalier attitude toward his substance abuse problem and whether his actions were worse than a typical attempted robbery should have been submitted to a jury. Citing *Blakely* and *Smylie*, Balderas asserts that enhancing his sentence based upon these improper aggravators constituted a violation of his rights, which "requires reversal and resentencing[.]" Appellants Br. at 9-10. The State maintains that Balderas "cannot raise an untimely *Blakely* challenge through a belated appeal" and that regardless, Balderas' Sixth Amendment rights were not violated. Appellee's Br. at 5-9 (citing *Robbins v. State*, 839 N.E.2d 1196 (Ind. Ct. App. 2005), *trans. not sought*,

and *Hull*, 839 N.E.2d 1250).

Very recently, we extensively analyzed the retroactivity issue in another belated appeal case and "conclude[ed] that *Blakely* applies retroactively because [the defendant's] case was not yet final when *Blakely* was decided." *Gutermuth v. State*, 848 N.E.2d 716, 726, (Ind. Ct. App. 2006), *trans. pet. filed*. Similarly, we conclude that in Balderas' case, "the availability of appeal via Post-Conviction Rule 2(1) had not yet been exhausted when *Blakely* was announced, and therefore *Blakely* must be given retroactive effect." *Id*. (citing *Griffith*, 479 U.S. at 328, *Sullivan v. State*, 836 N.E.2d 1031, 1035 (Ind. Ct. App. 2005), and *Fosha v. State*, 747 N.E.2d 549, 552 (Ind. 2001)). In reaching this conclusion, we echo the concerns outlined in *Gutermuth*. *See id.* at 730 (noting that retroactive application of *Blakely* is likely to have a "highly detrimental effect on the administration of justice," and that it would wreak "havoc" on trial courts across the country). We reaffirm: "Unless and until the U.S. Supreme Court revises or clarifies its rules on retroactivity, however, we are bound to consider the merits of belated *Blakely* appeals where appropriate." *Id*.; *but see Robbins*, 839 N.E.2d 1196, and *Hull*, 839 N.E.2d 1250.

Hence, we now address the merits of Balderas' *Blakely* claim. A trial court's discretion in sentencing includes the ability to determine whether a presumptive sentence should be increased because of aggravating circumstances or decreased because of mitigating circumstances. *Bacher v. State*, 722 N.E.2d 799, 801 (Ind. 2000). When a defendant is sentenced to a term of imprisonment that is greater than the presumptive sentence, this court will examine the record to ensure that the trial court explained its reasons for selecting the sentence it imposed. In particular, the sentencing court's statement of reasons must include:

(1) an identification of the significant aggravating and mitigating circumstances; (2) specific facts and reasons that led the court to find the existence of such circumstances; and (3) an articulation demonstrating that the mitigating and aggravating circumstances have been evaluated and balanced in determining the sentence. *Id.*

"By its own terms, and as consistently recognized by our cases analyzing *Blakely*, an enhancement based upon criminal history does not trigger a *Blakely* analysis." *Dillard v. State*, 827 N.E.2d 570, 575 (Ind. Ct. App. 2005), *trans. denied*. Accordingly, no *Blakely* problem exists regarding the prior criminal history aggravating circumstance in Balderas' case. Aggravating circumstances admitted by a defendant are also proper under *Blakely*. *Marshall v. State*, 832 N.E.2d 615, 622 (Ind. Ct. App. 2005), *trans. denied*. Therefore, Balderas' uncharged criminal activity was properly considered as an aggravator. While the court also noted Balderas' "prior attempts at rehabilitation," this is not a separate aggravator, but a "legitimate observation[] about the weight to be given to facts" comprising Balderas' criminal history. *Williams v. State*, 838 N.E.2d 1019, 1021 (Ind. 2005) (discussing how derivative statements do not implicate *Blakely*). Similarly, the fact that Balderas was on probation at the time he committed both the present offense and a past offense was derivative of his criminal history, not a separate aggravator, and does not implicate *Blakely*.

We also see no *Blakely* problem with the court's use of the nature and circumstances of the crime in this case. The court noted that Balderas hit one of the victims with a baseball bat, that the phone line to the victims' residence was cut, and that Balderas and his co-defendant kicked in the door of the victims' home to gain entry. Sent. Tr. at 42-43. The court gleaned this information from admissions made by Balderas at the guilty plea hearing,

from the probable cause affidavit *offered into evidence by Balderas*, and from Balderas' confirmation at the sentencing hearing that he had laid a factual basis for attempted robbery. *See* GPTr. at 20-24; Sent. Tr. at 9; *see McGinity v. State*, 824 N.E.2d 784, 788-89 (Ind. Ct. App. 2005) (finding no *Blakely* violation where defendant "stipulated to the admission of and admitted to the facts as stated in the Probable Cause Affidavit as the factual basis for his guilty plea" because under *Blakely* "if a defendant admits to facts underlying an aggravator, the jury does not have to determine beyond a reasonable doubt whether that aggravator exists"), *trans. denied*.

While the nature and circumstances presents no *Blakely* concern, we cannot say the same about the court's use of Balderas' "cavalier attitude toward his substance abuse problem" as a reason to enhance sentence. Balderas' acknowledgement of his alcohol and drug problem is not tantamount to an admission of a cavalier attitude, nor was there a jury finding on this aggravator.

We have explained:

> Even one valid aggravating circumstance is sufficient to support an enhancement of a sentence. When the sentencing court improperly applies an aggravating circumstance but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. This occurs when the invalid aggravator played a relatively unimportant role in the trial court's decision. When a reviewing court "can identify sufficient aggravating circumstances to persuade it that the trial court would have entered the same sentence even absent the impermissible factor, it should affirm the trial court's decision." When a reviewing court "cannot say with confidence that the impermissible aggravators would have led to the same result, it should remand for re-sentencing by the trial court or correct the sentencing on appeal."

Means v. State, 807 N.E.2d 776, 788 (Ind. Ct. App. 2004) (citations omitted), *trans. denied*; *see also Bonds v. State*, 729 N.E.2d 1002, 1005 (Ind. 2000) (noting that one aggravating

circumstance, alone, is sufficient to justify an enhanced sentence); *Merlington v. State*, 814 N.E.2d 269, 273 (Ind. 2004) ("If one or more aggravating circumstances cited by the trial court are invalid, the court on appeal must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed.").

Here, we can easily identify sufficient aggravating circumstances to persuade us that the trial court would have entered the same sentence even absent the impermissible "cavalier attitude" factor. We are confident that given Balderas' lengthy criminal history, including charged and uncharged offenses, probation violations, and unsuccessful attempts of rehabilitation, as well as the facts and circumstances of the crime, the same sentence would have been ordered.

III. Appropriateness

Balderas next contends that his sentence is inappropriate in light of the nature of his offense and his character. Specifically, Balderas asserts that his mental problems, the poor parenting to which he was allegedly subjected, his guilty plea, and his accessory involvement in the crime militate a sentence less than nineteen years.[5]

Indiana Rule of Appellate Procedure 7(B) states: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." "Although appellate review of sentences must give due consideration to the trial

[5] Recently, our supreme court reiterated that a defendant who enters an open plea does not acquiesce in his sentence or implicitly agree that the sentence is appropriate, thereby waiving a future Appellate Rule 7(B) challenge. *Childress v. State*, 848 N.E.2d 1073, 1078-79 (Ind. 2006). Applied here, Balderas did not waive an appropriateness challenge to his sentence.

court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied.*

While the nature of the offenses is normally discerned from the evidence presented at trial, in the case of a guilty plea, we do not have such information. Instead, we look to the factual basis, which in this case was drawn from the probable cause affidavit and Balderas' admissions. According to the affidavit, Balderas and his co-defendant, wearing ski masks and armed with baseball bats and a knife, kicked in the front door of a residence, awakened the victims, and cut the phone cord. App. at 15. As the co-defendant grabbed the male victim and took him into a room containing a lock box, the co-defendant stated, "I'm going to tie you up and cut you up." *Id*. Simultaneously, Balderas grabbed the female victim and kept her in a separate room. *Id*. Shortly thereafter, the co-defendant laid down his bat and turned, at which point the male victim grabbed the bat and hit the co-defendant, which caused the co-defendant to drop his knife. *Id*. The male victim grabbed the knife and stabbed the co-defendant. *Id*. at 15-16. Balderas then grabbed a baseball bat and started hitting the male victim. *Id*. at 16. Both victims ran into a bedroom and closed the door until Balderas and the co-defendant left. *Id*.

Regarding Balderas' mental problems and the alleged poor parenting to which he was subjected, the court did weigh these considerations when it found Balderas' emotional disability to be a mitigating factor. However, the court was not required to, and indeed did not, assign this mitigator as much weight as Balderas may have wanted. *See Kelly v. State*,

719 N.E.2d 391, 395 (Ind. 1999) (noting that it is within trial court's discretion to determine whether mitigating circumstances are significant and what weight to accord to identified circumstances); *cf. Page v. State*, 615 N.E.2d 894, 896 (Ind. 1993) ("Evidence of a troubled childhood does not require the trial court to find it to be a mitigating circumstance.").[6]

As for Balderas' guilty plea, we cannot disagree with the court's decision assigning it no mitigating weight. "[N]ot every plea of guilty is a significant mitigating circumstance that must be credited by a trial court." *Trueblood v. State*, 715 N.E.2d 1242, 1257 (Ind. 1999). If a guilty plea "saves the State the time and expense inherent in a lengthy trial" and "accordingly extends a benefit to the State and the victim's family by avoiding a full-blown trial, as well as demonstrating the defendant's acceptance of responsibility for a crime," the plea should be accorded significant mitigating weight. *Id*. Here, Balderas received a substantial benefit in that the State dismissed three other class B felonies as well as two other counts from a separate case in exchange for his guilty plea. Had he been tried and found guilty on the original charges, Balderas could have received a sentence of more than eighty years. *See Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999) (holding that guilty plea is not significant mitigating factor when defendant has already received significant benefit from plea); *see also Wells v. State*, 836 N.E.2d 475, 480 (Ind. Ct. App. 2005) (noting guilty plea decision was "largely a pragmatic one"), *trans. denied*. Moreover, in light of Balderas' protestations at sentencing about the eye color of the perpetrator and the lack of fingerprints,

[6] In addressing the character prong of the Rule 7(B) appropriateness question, both Balderas and the State discuss mitigators, which is usually a separate, though often-times related, inquiry. To the extent that the analysis of mitigators overlaps with the examination of the appropriateness question in this case, the concepts will be addressed together.

the court also could have determined that Balderas did not accept responsibility for his actions. Sent. Tr. at 44-47.

In response to Balderas' argument that he was merely an accessory, we cannot fault the court for assigning this no mitigating weight in light of the following exchange:

> Defense Counsel: And we talked about whether it was [co-defendant] or you or whoever had the knife or the bat, you're both just as guilty of that. And you understand that. Is that correct?
>
> Balderas: Yeah.
>
> Defense Counsel: And you agree with that?
>
> Balderas: Yeah.

GPTr. at 23.

In sum, given the nature of the circumstances, as outlined *supra*, and Balderas' character, as revealed by his already lengthy[7] criminal history, probation violations, unsuccessful rehabilitation, and refusal to take responsibility, we cannot say his enhanced, but less-than-maximum, sentence was inappropriate.

Affirmed.

BAILEY, J., concurs.

KIRSCH, C.J., concurs in parts I and III and concurs in result in part II.

[7] The criminal history portion of Balderas' presentence investigation report takes up four pages, and Balderas was not quite twenty-three years old at the time of the report. Supp. App. at 1, 3-6.